Epacland Sdn Bhd v Kean Seong Co Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–350 OF 2006
CHEW SOO HO JC
8 MARCH 2012

Civil Procedure — Costs — Determination, of — Court's discretion — Whether court may order non-party to pay costs — Rules of the High Court 1980 O 59 r 2

Civil Procedure — Res judicata — Issue estoppel — Purchaser seeking specific performance of contract for sale and purchase of land — Issue whether valid and binding contract existed — Separate originating summons ('OS') filed for removal of purchaser's caveat — Finding made in OS suit that no valid contract existed — Consent order entered in appeal against decision in OS suit with liberty to submit on issue of whether valid contract existed — Whether purchaser prevented by res judicata from relitigating in main suit issue of whether valid contract existed

Civil Procedure — Res judicata — Waiver, of — Whether parties may waive or ignore application of res judicata

Contract — Formation — Sale and purchase of land — Oral agreement — Whether oral contract for sale and purchase of land had been concluded at meeting — Contract subject to formal sale and purchase agreement to be drawn up — Whether parties had agreed to the fundamental terms — Intention of contracting parties must be ad idem — Inference of intention from surrounding circumstances — Whether pre-condition that defendant company had to obtain approval through EGM for sale rendered offer or acceptance as equivocal or qualified — Whether contract not concluded

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The defendant owned a piece of land ('the said land') which it intended to sell and the plaintiff intended to buy. The plaintiff's representatives and the defendant's representatives had a meeting on 20 February 2006 to discuss the sale and purchase of the said land. The plaintiff alleged that at this meeting, both parties had agreed to the fundamental terms of the sale and purchase ie the selling price at RM2,161,394.90, sale without vacant possession but with two squatter buildings, payment of compensation to the squatters and completion date of nine months. Vide a letter dated 23 February 2006, the defendant's solicitors requested for earnest money in the sum of RM10,000 which was duly paid by the plaintiff. The plaintiff contended that a contract had been concluded at this meeting itself. Thus when the defendant refused to sell the said land to the plaintiff subsequently, plaintiff took out this suit claiming, inter alia, for specific performance. The plaintiff also lodged a caveat on the said land. Defendant's version was that there was no concluded contract at the meeting on 20 February 2006 but that it was subject to further consideration and particularly that the sale would need the approval of the EGM of the defendant's company. It was emphasised that there would not be any concluded and binding agreement unless and until the sale and purchase agreement had been duly executed and that was expressed in their solicitors' letters as well. On the request for the earnest money, the defendant averred that the purpose was to show its EGM the sincerity of the plaintiff to buy the said land for the consideration of its shareholders but the cheque was never cashed. Since the minority shareholders could come up with a better offer to buy the said land, defendant decided not to sell it to the plaintiff. The defendant filed an Originating Summons ('OS') to remove the plaintiff's caveat on the ground that there was no binding contract. The OS was heard separately and the defendant's application to remove the caveat was allowed. The plaintiff appealed against that decision. Meanwhile, the defendant had also applied by way of summons in chambers to strike out the plaintiffs summons and statement of claim under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('RHC'). This application was dismissed and the defendant appealed against that decision. Subsequently, both parties entered into a consent order wherein both parties agreed to withdraw their respective appeals and that they were at liberty to submit on the issues raised in the private caveat at the trial of this action. Relying on the decision of the learned judge in the OS application that there was no binding and concluded contract, the defendant submitted that res judicata would operate to estop the plaintiff from relitigating on this same issue. The plaintiff contended that there was no issue

of res judicata as the parties had entered into the consent order which permitted the parties to ventilate the issues in the trial proper. The issues which arose for determination were: (i) the issue of res judicata; and (ii) whether there was a concluded contract arising from the meeting between the parties on 20 February 2006. The defendant also sought for costs to be borne by PW3, the director of the plaintiff personally.

Held, dismissing the plaintiff's claim with costs:

(1) Issue estoppel would encompass issues or facts which are so clearly part of the subject matter of the litigation. Therefore res judicata applied to such matters as vacant possession, squatters, completion date and power of attorney which were so clearly part of the issue of whether there was a binding and concluded contract besides the price, the earnest money and the intention of the parties. Even if these clear related matters were not raised, issue estoppel still applied as it is not confined to issues raised but issues or matter so clearly related there with which are not raised (see paras 20–21); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (SC) referred; *Chemfert Sdn Bhd & Anor v Urn Hua* [2010] 5 MLJ 228 referred.

(2) The OS ought to have been heard together in the trial of this suit to serve its purpose of the OS being consolidated with this suit. Since the parties chose to proceed with the OS which involved the issues and facts which were practically the same issues and facts of this trial, it must be construed that parties were prepared to accept the findings and decision of the OS and that such findings and decision would have determined the suit for reason that when the learned judge found that there was no binding and concluded contract, the whole basis of the plaintiff's claim contending that there was such a binding and concluded contract failed (see para 21).

(3) Applying the 'Bozson' test, when the learned judge had found that there was not in existence such a concluded and binding agreement that disposed of the rights of the parties herein and the whole crux of contention of the parties. Consequently, the judgment of the learned judge in the OS was a final and not interlocutory judgment (see para 22).

(4) Res judicata is a legal doctrine. It is against public policy and not permissible for parties to waive or ignore its applicability by mutual consent or to contract out. Hence, the plaintiff could not rely on a term agreed upon by consent to oust the applicability of the law. Doctrine of res judicata was thus still applicable to estop the same issues which had already been litigated and decided by the learned judge in the OS proceeding from being reopened again (see para 24).

(5) The defendant's condition that they needed to get the consent or approval through an EGM of the company before they could conclude

the sale and purchase agreement would place their offer or acceptance as equivocal or qualified. Hence, it could not be said that a contract had been concluded (see para 24).

(6) When the issue of having to seek the approval of the EGM became a pre-condition to the defendant before they could formally enter into a contract with the plaintiff, it was untenable to argue that the defendant needed not obtain such approval but had to force through the EGM with the majority shareholding of the two directors in order to sell the said land to the plaintiff (see para 32).

(7) On the facts of the case, the earnest money requested for did not constitute a contract within a contract as the offer was conditional which meant that an unqualified acceptance by the plaintiff would not render a contract to exist in such circumstances (see para 35); *Jagathesan v Linggi Plantations Ltd* [1969] 2 MLJ 253 referred; *Low Kar Yit & Ors v Mohamed Isa & Anor* [1963] MLJ 165 referred.

(8) The intention of contracting parties to enter into a concluded contract must be *ad idem* and not unilateral. Intention can be inferred from the words of the parties, their conduct and from the surrounding circumstances (see para 40).

(9) The intention of the defendant had been expressed unequivocally that there shall be no binding contract unless and until a binding written one had been duly executed by both parties herein. The fact that of the instant case was not one where parties had agreed on all essential terms and conditions but subject to a formal sale and purchase agreement to be drawn up or subject to further contract. There was no concluded contract for the sale and purchase of the said land between the plaintiff and the defendant on 20 February 2006 when the parties had not executed a binding written sale and purchase agreement. Moreover not all essential terms and condition of the alleged contract had been agreed upon (see para 40); *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 referred; *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108 referred.

(10) Order 59 r 2 of the RHC gives the court the full power to determine by whom and to what extent the costs are to be paid. The court has the power to direct a non-party to pay costs of this suit. However, there was nothing culpable on the part of PW3 to justify any order for costs against him personally (see para 45); *Takako Sakao (f) v Ng Peh Yuan (f) & Anor (No 3)* [2010] 2 MLJ 141 (FC) referred.

[Bahasa Malaysia summary

Defendan memiliki sebidang tanah ('tanah tersebut') yang mana dia berhasrat untuk menjual dan plaintif berniat untuk membeli. Wakil-wakil plaintif dan

wakil-wakil defendan telah mengadakan perjumpaan pada 20 Februari 2006 untuk membincangkan jual beli tanah tersebut. Plaintif mendakwa pada perjumpaan tersebut, kedua-dua pihak telah bersetuju dengan terma penting jual beli iaitu harga jualan pada RM2,161,394.90, penjualan tanpa milikan kosong tetapi dengan dua bangunan rumah setinggan, pembayaran balasan kepada setinggan-setinggan dan tarikh penyempurnaan selama sembilan bulan. Melalui surat bertarikh 23 Februari 2006, peguam-peguam defendan meminta wang cengkeram berjumlah RM10,000 yang mana telah dibayar oleh plaintif. Plaintif berhujah bahawa kontrak telah dicapai pada perjumpaan itu. Justeru apabila defendan enggan menjual tanah tersebut kepada plaintif berikutnya, plaintif telah membuat guaman menuntut, antara lain, perlaksanaan spesifik. Plaintif juga telah memasukkan kaveat ke atas tanah tersebut. Versi defendan adalah bahawa tidak terdapat kontrak yang dicapai pada perjumpaan pada 20 Februari 2006 tetapi adalah tertakluk kepada balasan selanjutnya dan terutamanya bahawa jualan tersebut memerlukan kebenaran EGM syarikat defendan. Adalah ditegaskan bahawa tidak terdapat perjanjian yang tercapai dan terikat melainkan dan sehingga perjanjian jual beli telah ditandatangani dan bahawa ianya juga telah dinyatakan di dalam surat-surat peguam mereka. Mengenai permintaan wang cengkeram, defendan menegaskan bahawa tujuannya adalah untuk menunjukkan EGM ketulusan plaintif untuk membeli tanah tersebut dengan pertimbangan pemegang-pemegang saham tetapi cek tersebut tidak pernah ditunaikan. Memandangkan pemegang-pemegang saham minoriti boleh memberikan tawaran yang lebih baik untuk membeli tanah tersebut, defendan memutuskan untuk tidak menjualkannya kepada plaintif. Defendan telah memfailkan saman pemula ('SP') untuk menarik balik kaveat plaintif atas dasar bahawa tidak terdapat kontrak yang terikat. SP telah didengar secara berasingan dan permohonan defendan untuk menarik balik kaveat telah dibenarkan. Plaintif membuat rayuan terhadap keputusan tersebut. Sementara itu, defendan juga telah memohon melalui saman dalam kamar untuk membatalkan saman-saman plaintif dan penyataan tuntutan di bawah A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Permohonan ini telah ditolak dan defendan membuat rayuan terhadap keputusan tersebut. Selanjutnya, kedua-dua pihak telah memeterai perintah kebenaran di mana kedua-dua pihak bersetuju untuk menarik balik rayuan masing-masing dan bahawa mereka bebas untuk mengemukakan isu-isu yang dibangkitkan dalam kaveat persendirian pada perbicaraan tindakan ini. Berdasarkan kepada keputusan hakim bijaksana dalam permohonan SP bahawa tidak terdapat kontrak terikat dan tercapai, defendan berhujah bahawa res judicata akan digunakan untuk mengestop plaintif daripada membuat litigasi semula isu yang sama. Plaintif berhujah bahawa tidak terdapat isu res judicata memandangkan pihak-pihak telah memasuki perintah kebenaran yang mana membenarkan pihak-pihak mengutarakan isu-isu di dalam perbicaraan wajar. Isu-isu yang timbul untuk penentuan adalah: (i) isu res judicata; dan (ii) sama ada terdapat kontrak yang tercapai berbangkit daripada perjumpaan antara

pihak-pihak pada 20 Februari 2006. Defendan juga memohon untuk kos untuk ditanggung oleh PW3, pengarah plaintif secara peribadi.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Isu estopel merangkumi isu-isu atau fakta-fakta yang sangat jelas sebahagian daripada perkara subjek litigasi. Justeru res judicata diguna pakai terhadap perkara-perkara seperti milikan kosong, setinggan-setinggan, tarikh penyempurnaan dan surat kuasa wakil yang mana sangat jelas merupakan sebahagian daripada isu sama ada terdapat kontrak terikat dan tercapai selain daripada harga, wang cengkeram dan niat pihak-pihak. Meskipun perkara berkaitan yang jelas ini tidak dibangkitkan, isu estopel seharusnya diguna pakai memandangkan ianya tidak tertakluk kepada isu-isu berbangkit tetapi isu-isu atau perkara yang sangat jelas berkaitan yang mana tidak dibangkitkan (lihat perenggan 20–21); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (MA) dirujuk; *Chemfert Sdn Bhd & Anor v Urn Hua* [2010] 5 MLJ 228 dirujuk.

(2) SP seharusnya didengar secara bersama di dalam perbicaraan guaman ini untuk mencapai tujuan SP yang digabungkan dengan guaman ini. Memandangkan pihak-pihak memilih untuk meneruskan SP yang mana melibatkan isu-isu dan fakta-fakta yang mana sama dengan isu-isu dan fakta-fakta untuk perbicaraan, ia seharusnya ditafsir bahawa pihak-pihak bersedia untuk menerima dapatan-dapatan dan keputusan SP dan dapatan dan keputusan tersebut seharusnya menentukan guaman dengan sebab bahawa apabila hakim yang bijaksana mendapati bahawa tidak terdapat kontrak terikat dan tercapai, oleh itu asas keseluruhan tuntutan plaintif yang mendakwa bahawa terdapat kontrak yang terikat dan tercapai sedemikian telah gagal (lihat perenggan 21).

(3) Menggunakan ujian 'Bozson', apabila hakim yang bijaksana telah mendapati bahawa tidak wujud perjanjian tercapai dan terikat yang mana menyatakan hak pihak-pihak dan keseluruhan intipati hujahan pihak-pihak. Selanjutnya, penghakiman hakim yang bijaksana SP adalah muktamad dan bukan penghakiman interlokutori (lihat perenggan 22.

(4) Res judicata adalah doktrin perundangan. Ia bercanggah dengan polisi awam dan pihak-pihak tidak dibenarkan untuk melupuskan atau menghiraukan bahawa ia terpakai melalui kebenaran bersama atau untuk keluar dari kontrak. Justeru, plaintif tidak boleh bersandarkan kepada terma yang dipersetujui oleh kebenaran untuk menyingkirkan undang-undang terpakai tersebut. Doktrin res judicata oleh itu masih terpakai untuk mengestop isu-isu yang sama yang mana telah dilitigasi dan diputuskan oleh hakim yang bijaksana di dalam prosiding SP daripada dibuka semula (lihat perenggan 24).

(5) Keadaan defendan bahawa mereka perlu mendapat kebenaran atau kelulusan melalui EGM syarikat sebelum mereka boleh mencapai perjanjian jual beli menempatkan tawaran atau penerimaan mereka sebagai tidak jelas atau bersyarat. Justeru, ia tidak boleh dikatakan bahawa suatu kontrak telah tercapai (lihat perenggan 24).

(6) Apabila isu untuk mendapatkan kelulusan EGM menjadi pra-syarat untuk defendan sebelum mereka boleh memeterai kontrak secara formal dengan plaintif, hujahan bahawa defendan tidak perlu mendapatkan kelulusan sedemikian tetapi perlu dibentangkan melalui EGM dengan pegangan saham majoriti dua pengarah untuk menjual tanah kepada plaintif tidak dapat dipertahankan (lihat perenggan 32).

(7) Berdasarkan fakta-fakta kes, wang cengkeram yang diminta tidak membentuk kontrak dalam kontrak memandangkan tawaran adalah dengan syarat yang mana bermaksud bahawa penerimaan tanpa syarat oleh plaintif tidak mewujudkan kontrak dalam keadaan sedemikian; (lihat perenggan 35); *Jagathesan v Linggi Plantations Ltd* [1969] 2 MLJ 253 dirujuk; *Low Kar Yit & Ors v Mohamed Isa & Anor* [1963] MLJ 165 dirujuk.

(8) Niat pihak-pihak dalam kontrak untuk memeterai kontrak yang tercapai hendaklah *ad idem* dan bukan pada satu pihak. Niat boleh ditafsir daripada perkataan pihak-pihak, tindakan mereka dan daripada keadaan sekeliling (lihat perenggan 40).

(9) Niat defendan telah dinyatakan dengan jelas bahawa tidak terdapat kontrak terikat melainkan dan sehingga kontrak bertulis yang terikat telah ditandatangani oleh kedua-dua pihak. Fakta bahawa kes ini bukanlah di mana pihak-pihak telah bersetuju dengan kesemua terma-terma dan syarat-syarat penting tetapi tertakluk kepada perjanjian jual beli formal yang harus ditulis atau tertakluk kepada kontrak selanjutnya. Tidak terdapat kontrak yang tercapai untuk jual beli bagi tanah tersebut antara plaintif dan defendan pada 20 Februari 2006 apabila pihak-pihak tidak menandatangani perjanjian jual beli bertulis yang terikat. Tambahan bukan semua terma dan syarat penting kontrak yang didakwa telah dipersetujui (lihat perenggan 40); *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 dirujuk; *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108 dirujuk.

(10) Aturan 59 k 2 KMT memberikan mahkamah kuasa penuh untuk memutuskan setakat mana dan oleh siapa kos harus dibayar. Mahkamah mempunyai kuasa untuk memerintah parti yang tidak terlibat untuk membayar kos untuk guaman ini. Walau bagaimanapun, tidak terdapat kesilapan di pihak PW3 untuk menjustifikasikan apa-apa perintah untuk kos terhadapnya secara peribadi (lihat perenggan 45); *Takako Sakao (f) v Ng Peh Yuan (f) & Anor (No 3)* [2010] 2 MLJ 141 (MP) dirujuk.]

Notes

For a case on sale and purchase of land, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) para 4432.

For cases on existence of oral agreement, see *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5397–5401.

For cases on issue estoppel, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7210–7229.

For cases on subject to contract, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4437–4447.

Cases referred to

Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira [1986] 2 All ER 409, HL (refd)

Arumugam Pillai v Government of Malaysia [1980] 2 MLJ 283, FC (folld)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprise Sdn Bhd [1994] 2 MLJ 754, SC (refd)

Bozson v Alltrincham Urban District Council [1903] 1 KB 547, CA (folld)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)

Chemfert Sdn Bhd & Anor v Lim Hua [2010] 5 MLJ 228; [2010] 7 CLJ 491, CA (refd)

Chin Yoke Choong Bobby & Anor v Hong Lam Marine Pte Ltd [2000] 1 SLR 137, CA

Dato' Ting Check Sii v Pelita Towerview Sdn Bhd & Anor [2011] 9 MLJ 843, HC (refd)

Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290, FC (refd)

Goh Keat Poh & Ors v Farlim Properties Sdn Bhd and other appeal [2009] 5 MLJ 449, CA (refd)

Haron bin Mohd Zaid v Central Securities (Holdings) Berhad [1982] 2 MLJ 94, PC (refd)

Ho Kam Phaw v Fam Sin Nin [1998] 2 MLJ 713; [1998] 3 CLJ 708,CA (refd)

Hong Kim Sui v Malayan Banking Bhd [1971] 1MLJ 289, FC (refd)

Jagathesan v Linggi Plantations Ltd [Leave to appeal to the Privy Council had been granted] [1969] 2 MLJ 253, FC (distd)

Kam Mah Theatre Sdn Bhd v Tan Lay Soon [1994] 1 MLJ 108, SC (refd)

Karting Club of Singapore v David Mah & Ors [1992] 2 SLR 483 (refd)

Karuppiah v Petaling Garden Co Sdn Bhd [1972] 1 MLJ 11 (refd)

Kim Guan & Co Sdn Bhd v Yong Nyee Fan & Sons Sdn Bhd [1983] 2 MLJ 8, PC (refd)

Ko Lim Tristar Sdn Bhd v Peninsular Home Sdn Bhd [2008] MLJU 430, HC (refd)

Lian Mong Yee v Abdul Rashid bin Maidin & Ors [2001] 4 MLJ 38; [2001] 3 CLJ 905, CA (refd)

Low Kar Yit & Ors v Mohamed Isa & Anor [1963] 1 MLJ 165 (refd)
Ng Cheng Yoon v Mah binti Mat Isa [1981] 1 MLJ 218, FC (refd)
Peninsular Land Development Sdn Bhd v K Ahmad (No 2) [1970] 1 MLJ 253, FC (refd)
Prospective Management Services Sdn Bhd v Seganom Sdn Bhd [2004] 4 CLJ 466, CA (refd)
Puncak Niaga (M) Sdn Bhd v CGE Utilities (M) Sdn Bhd [2001] MLJU 550, HC (refd)
Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor [2003] 6 MLJ 279, HC (refd)
Ratnam v Cumarasamy & Anor [1962] MLJ 330, CA (refd)
SCF Finance Co Ltd v Mash (No 3) [1987] 1 All ER 194, CA (folld)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31, CA (refd)
Symphony Group Plc v Hodgson [1994] QB 179, CA (refd)
Takako Sakao (f) v Ng Peh Yuan (f) & Anor (No 3) [2010] 2 MLJ 141, FC (refd)
Tiong Guan Co (Pte) Ltd v Lam Kong Ko Ltd (No 2) [1998] 7 MLJ 720, HC (refd)
Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd [2011] 4 MLJ 681, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Companies Act 1965
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d), O 59 r 2

Karin Lim (WC Tan with her) (Presgrave & Matthews) for the plaintiff.
Lean Hean Cheng (YC Wong with him) (Lee Hean Cheng & Co) for the defendant.

Chew Soo Ho JC:

BRIEF FACTS

[1] The plaintiff is a limited company incorporated under the Companies Act 1965 with a paid up capital of RM3 while the defendant is similarly a limited company incorporated under the same Act.

[2] The defendant is the registered owner of a parcel of land known as Lot 905 Mukim 9, Daerah Barat Daya, Pulau Pinang held under Geran Mukim GM 577 ('the said land') and intended to sell the said land.

[3] Through the introduction of an agent (unlicensed) both the plaintiff and the defendant had a meeting on 20 February 2006 at the defendant's office at

Wisma Chuan Bee, Chulia Street, Penang attended by a director of plaintiff Ng Kock Leong with their solicitor, two directors of defendant namely Teh Khee Yeoh and Teh Tai Wooi and the son of Teh Tai Wooi who was a lawyer to discuss the sale and purchase of the said land.

[4] The plaintiff alleged that at this meeting, both parties had agreed to the fundamental terms of the sale and purchase ie the selling price at RM2,161,394.90, sale without vacant possession but with two squatter buildings remaining on the said land, the payment of compensation to the squatters for vacant possession to be deposited by the plaintiff with the defendant as stakeholder to assist to pay off the squatters and the completion date of nine months from the date of the sale and purchase agreement. Vide a letter dated 23 February 2006 from the defendant's solicitors to the plaintiff's solicitor at the material time, defendant had also requested for earnest money in the sum of RM10,000 which was duly paid by the plaintiff. The plaintiff therefore contended that a contract had been concluded at this meeting itself. Thus when the defendant refused to sell the said land to the plaintiff subsequently, the plaintiff took out this suit claiming, inter alia, for specific performance, general damages, injunction to restrain disposal of the said land and costs. Before filing this action, the plaintiff had also lodged a caveat on the said land.

[5] The defendant's version is that there was no concluded contract at the meeting on 20 February 2006 but that it was subject to further consideration and particularly that the sale would need the approval of the EGM of the defendant's company. It was emphasised that there would not be any concluded and binding agreement unless and until the sale and purchase agreement had been duly executed by both parties and that was expressed in their solicitors' letters as well. defendant also denied having discussed the squatters' compensation in the said meeting but that it was after the meeting that defendant had met the squatters to find out the compensation sum they proposed. The alleged nine months completion date was denied by the defendant on ground that it was too long and could not have been agreed. On the request for the earnest money, defendant averred that the purpose was to show its EGM the sincerity of the plaintiff to buy the said land for the consideration of its shareholders but the cheque was never cashed. Since the minority shareholders could come up with a better offer to buy the said land, defendant decided not to sell it to the plaintiff.

ORIGINATING SUMMONS NO 24–912 OF 2006 AND INTERLOCUTORY PROCEEDING

[6] The defendant had filed an Originating Summons No 24–912 of 2006 dated 8 June 2006 which case has been consolidated with the instant suit vide

the order of the court dated 22 November 2007, to remove the caveat lodged by the plaintiff on the said land vide *Kaveat Persendirian Perserahan No* 173/2006 which was registered on 10 March 2006. The ground for the removal of the caveat was purely that there was no binding and concluded contract in respect of the sale and purchase of the said land. Although this OS was consolidated with this suit, it was proceeded on a separate hearing and after its full hearing, the said application by the defendant was allowed and the caveat was ordered to be removed immediately. This order of the learned judge was made on 25 February 2010 (bundle C pp 268–270). The plaintiff had filed an appeal against this order.

[7] The defendant had also applied by way of summons in chambers dated 24 August 2006 to strike out the plaintiff's summons and statement of claim under O 18 r 19(1)(a), (b), (d), O 59 r 2 of the Rules of the High Court 1980. This application was heard and dismissed by the learned judicial commissioner on 27 May 2010 for which the defendant had also filed an appeal.

[8] Vide a summons in chambers dated 9 March 2010 by the plaintiff which was heard by the learned judicial commissioner on 16 June 2011, both parties have entered into a consent order, inter alia, that both parties are to withdraw their respective appeal to the Court of Appeal and that they are at liberty to submit on the issues raised in the private caveat lodged by the plaintiff on the said land at the trial of this action (bundle C pp 450–452).

[9] Relying on the decision of the learned judge in Originating Summons No 24–912 of 2006 above that there was no binding and concluded contract, inter alia, other grounds for the plaintiff's caveat on the said land to be removed, defendant submitted that res judicata would operate to estop the plaintiff from relitigating on this same issue.

[10] The plaintiff contended that there is no issue of res judicata when the parties have entered into a court order on 16 June 2011 which permits the parties to ventilate the issues in the trial proper.

THE ISSUES IN THIS TRIAL

[11] Since issue of res judicata has been raised in submission, it will be considered as the first issue hereunder.

[12] The second and main issue before this court is whether there was a concluded contract entered into between the plaintiff and the defendant for the sale and purchase of the said land at the meeting between the parties on 20 February 2006.

[13] If there was a concluded contract, the ensuing issue is whether the plaintiff has proved that it is able and willing at all time to perform its part of the contract or obligations under the contract to be entitled to specific performance. If there is no concluded contract, this issue does not arise.

EVALUATION AND FINDINGS

Res judicata

[14] To recapitulate the fact above, plaintiff had lodged a private caveat on the said land vide Kaveat Persendirian Perserahan No 173/2006 and the defendant vide OS 24–912 of 2006 had applied to remove the said caveat on ground that there was no binding and concluded contract between the parties herein this case. That OS was duly heard by the learned judge YA Dato' Abdul Halim bin Aman who on 25 February 2010 had ordered the caveat to be removed. His Lordship's ground of judgment is enclosed in bundle C pp 272–280. Basically, His Lordship found no binding and concluded contract for the sale and purchase of the said land to render the plaintiff to have caveatable interest. The plaintiff had filed an appeal against such order but this appeal was subsequently withdrawn upon the consent by both parties with the defendant withdrawing their appeal against the order of court refusing to strike out the plaintiff's summons and statement of claim. Parties had in fact entered into a consent order. Within this consent order dated 16 June 2011 (bundle C pp 449–452), it was stated, inter alia, that:

> … kedua-dua pihak bebas berhujah berkenaan isu-isu yang dibangkitkan berkenaan kaveat persendirian yang dimasukkan oleh plaintif ke atas hartanah tersebut semasa perbicaraan tindakan ini kelak.

[15] In other words, the issues raised in the removal of caveat proceeding as agreed can be submitted again in the trial proper. The defendant now submits that on a question of public policy and that there should be finality on litigation, res judicata which need not be pleaded ought to operate to bar the plaintiff from reopening the same issues citing the cases of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (SC); *Goh Keat Poh & Ors v Farlim Properties Sdn Bhd and other appeal* [2009] 5 MLJ 449 (CA). This is despite the fact that there was a consent order with a reservation of the issues in a previous proceeding citing *Prospective Management Services Sdn Bhd v Seganom Sdn Bhd* [2004] 4 CLJ 466 (CA) which adopted the principle of law as held in *SCF Finance Co Ltd v Mash (No 3)* [1987] 1 All ER 194 (CA) which was cited with approval by our Supreme Court in *Asia Commercial Finance*'s case.

[16] The plaintiff, on this point, submitted that there was no final judgment

or final determination as to whether there is a concluded agreement which is yet to be decided at the trial quoting *Puncak Niaga (M) Sdn Bhd v CGE Utilities (M) Sdn Bhd* [2001] MLJU 550. Referring to the two kinds of estoppel per rem judicatum on the cause of action and on issue, it was submitted that what the Supreme Court in *Asia Commercial Finance*'s case had decided is that there must be a final judgment having been given and that the issues are relitigated in a subsequent proceeding which contradicts the correctness of the previous, citing *Dato' Ting Check Sii v Pelita Towerview Sdn Bhd & Anor* [2011] 9 MLJ 843, *Quill Construction Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor* [2003] 6 MLJ 279. Relying on the terms of the consent order or consent judgment which included the relevant words as reproduced above, the plaintiff contended that it would not have entered into the consent judgment which would prevent it from ventilating the issues decided in the said OS at the trial had the defendant not agreed on it. It was further argued that a caveat is neither final or conclusive but in essence a temporary equitable remedy just like an interim injunction provided to maintain the status quo of the parties citing *Upmarket Development Sdn Bhd v Sriera Development Sdn Bhd* [2011] 4 MLJ 681. It was lastly contended that in the defendant's striking out application which was dismissed, it was found by the learned judicial commissioner who heard the application that there are triable issues for the case to go to trial. Hence the plaintiff submitted that the defendant's contention or averment was made mala fide in an attempt to prevent the issues to be ventilated in the trial taking into account the terms and conditions of the said consent judgment.

[17] The comprehensive doctrine of res judicata has been well expounded by His Lordship Peh Swee Chin SCJ in delivering the judgment of the Supreme Court in the case of *Asia Commercial Finance*. A good summary of the doctrine can be seen in the Court of Appeal case of *Chemfert Sdn Bhd & Anor v Lim Hua* [2010] 5 MLJ 228 at pp 236–239; [2010] 7 CLJ 491 at pp 501–504. Out of the 19 principles of law summarised from *Asia Commercial Finance*'s case by His Lordship Low Hop Bing JCA, I find it apt to reproduce the relevant ones applicable in the instant case as follows:

> (i) Res judicata simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum;
>
> (ii) When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties who should accept it as the truth — res judicata pro veritate accipitur;
>
> (iii) The public policy of the law is that it is the public interest that there should be finality in litigation — interest reipublicae ut sit finis litium;
>
> …
>
> (vii) The plea of res judicata applies, except in special cases, not only to points

A upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time: per Wigram VC in *Henderson v Henderson* [1843] 3 Hare 100 at p 115; the 'point' should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties;

…

C (x) There are in fact two kinds of estoppel per rem jusdicatum, the first relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first;

…

D (xiii) Issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, in law, issue estoppel means a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties; neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision;

E (xiv) Issue estoppel prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action: per Peter Gibson J in *Lawlor v Gray* [1984] 3 All ER 345 at p 350.

F …

(xvii) Res judicata for this purpose is therefore not confined to the issue which the court is actually asked to decide, but covers issues of facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a G new proceeding to be started in respect of them …

…

(xix) The court has the inherent jurisdiction to dismiss an action by applying the doctrine of res judicata against a party, even if it has not been pleaded, as estoppel is based on a question of public policy and there should be H finality in litigation …

[18] The issue as raised in the instant case is one of issue estoppel whether there was a binding and concluded contract between the parties herein which I has been the issue been the issue or ground in the OS for the removal of caveat lodged by the plaintiff on the said land and the learned judge hearing the application vide the said OS had so decided, inter alia, that the agreement between the plaintiff and defendant in relation to sale and purchase of the said land had not existed yet; negotiation was on going and the sale had not been

finalised as it required the consent to be obtained through the EGM. The learned judge also considered the intention of the parties and held that a contract had not come into existence to bind the plaintiff and the defendant when each and every correspondence of the defendant's solicitors stated that 'there shall be no binding contract for the sale by our clients to your clients of the said land until and unless a formal written agreement has been executed by both our clients and your clients'. The question of earnest money was also considered and the learned judge found that from the correspondence, this 'earnest money' was expressed only to be used as payment to the said land when a concluded agreement was signed but this did not materialise. The grounds of judgment of the learned judge recapitulated above can be found at bundle C pp 277–278.

[19] The plaintiff's contention of a concluded contract is that the total purchase price had been agreed upon with the sale of the said land to be without vacant possession as there were no more than two illegal structures thereon and that a sum of RM53,000 would be deposited with the defendant as stakeholder as compensation to the squatters as well as the agreement that the completion date was the nine months. It was also alleged that the defendant had consented to give the plaintiff a power of attorney besides the earnest money having been paid by the plaintiff to the defendant.

[20] In *Chemfert Sdn Bhd & Anor v Lim Hua*, the Court of Appeal held, inter alia, as follows on the question of issue estoppel which is in line with the decision of the Supreme Court in *Asia Commercial Finance*:

> Held …
>
> (3) Issue estoppel also applies to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence though not actually decided by the court. Res judicata is therefore not confined to the issues which the court is actually asked to decide, but covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them …

[21] Looking in that light, even though the learned judge hearing the said OS did not touch on the questions of vacant possession and squatters as well as the compensation, the completion date and power of attorney, all these are nevertheless matters relating to the same issue of whether there is a binding and concluded contract which was the principal issue and ground for determination in that application. As stated by the Court of Appeal above, issue estoppel would encompass issues or facts which are so clearly part of the subject matter of the litigation. Therefore res judicata will apply to such matters as vacant possession, squatters, completion date and power of attorney which are so clearly part of the issue of whether there was a binding and concluded

contract besides the price, the earnest money and the intention of the parties. Even if these clear related matters were not raised, issue estoppel will still apply on the above two authorities of the Supreme Court and Court of Appeal as it is not confined to issues raised but issues or matter so clearly related there with which are not raised. The ensuing question is whether the judgment of the learned judge given in OS 24–912 of 2006 which has been consolidated in this suit on 22 November 2007 is or is not a final judgment; bundle B pp 272–279 is the full ground of judgment. OS 24–912 of 2006 was filed separately from this suit but it was consolidated. With the consolidation with this suit, one would expect that the cause and issues raised in the OS would and ought rightly to have been heard and disposed of together in the trial of the suit itself. However, this OS was heard separately from this suit resulting in the aforesaid judgment. Parties ought to know when they proceeded to hearing of the said OS, the issues canvassed were directly the same issues of this trial ie whether there is a binding and concluded contract which is the basis for the lodging or removal of the caveat in that if there was such a concluded contract, the lodgment of the caveat would be proper and maintainable as the plaintiff would have the caveatable interest to do so but if there was no binding and concluded contract as the learned judge had held in the said OS, the caveat ought to be removed for want of caveatable interest. Similarly, if there was a binding and concluded contract, the plaintiff's claim in this suit would have been succeeded, otherwise, it would fail. This outcome and effect of the hearing of the OS must have been clear to parties when they elected to proceed to hearing of the OS separately from the trial of this suit proper. If not, the OS ought to have been heard together in the trial of this suit to serve its purpose of the OS being consolidated with this suit. Therefore, since parties have chosen to proceed with the OS which involves the issues and facts which are practically the same issues and facts of this trial, it must be construed that parties were prepared to accept the findings and decision of the OS and that such findings and decision would have determined the suit for reason that when the learned judge found that there was no binding and concluded contract, the whole basis of the plaintiff's claim contending that there was such a binding and concluded contract would fail and the plaintiff's case as the domino effect should fall. To determine whether a judgment is interlocutory or final, the *Bozson* test as laid down by Lord Alverstone CJ in *Bozson v Alltrincham Urban District Council* [1903] 1 KB 547 had been accepted and applied as a settled practice in our courts; see *Ratnam v Cumarasamy & Anor* [1962] MLJ 330; *Peninsular Land Development Sdn Bhd v K Ahmad (No 2)* [1970] 1 MLJ 253; *Hong Kim Sui v Malayan Banking Bhd* [1971] 1MLJ 289; *Arumugam Pillai v Government of Malaysia* [1980] 2 MLJ 283; *Ng Cheng Yoon v Mah binti Mat Isa* [1981] 1 MLJ 218 and *Haron bin Mohd Zaid v Central Securities (Holdings) Berhad* [1982] 2 MLJ 94, at p 97. This test is as follows:

Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

[22] The learned judge in the OS had not only dealt with the issue of removal of caveat but had also decided that there was no binding and concluded agreement between the parties herein over the sale and purchase of the said land giving his grounds for having so found. The crux of the plaintiff's case herein is that there was a concluded contract while the defendant's case is that there was no such contract until and unless the parties have executed a written sale and purchase agreement. Applying the *Bozson* test or Lord Alverstone's test above, when the learned judge had found that there was not in existence such a concluded and binding agreement that would have disposed of the rights of the parties herein and the whole crux of contention of the parties. Consequently, I hold that the judgment of the learned judge in the aforesaid OS is a final but not interlocutory judgment.

[23] I shall now consider the effect of the subsequent order of court dated 16 June 2011 where parties have consented to the terms particularly on the relevant part where the parties have agreed that there are at liberty to submit on the issues raised in relation to the private caveat at the trial. The plaintiff strenuously contended that the defendant had so agreed and cannot resile from the agreed term. The defendant contented that there must be a clear reservation of the issue and even if it did, a reservation of an issue by a party in a previous proceeding was ineffective to prevent the estoppel from arising against the said party citing in supporting *Prospective Management Services Sdn Bhd v Seganom Sdn Bhd*. Referring to *Goh Keat Poh & Ors v Farlim Properties Sdn Bhd and other appeal* [2009] 5 MLJ 449 where the Court of Appeal held that the decision of the Federal Court in an earlier case pertaining to removal of caveat which had decided that the 'Farlim agreements' were invalid would be binding on the parties to the Farlim agreements whereby by applying the doctrine of res judicata, the Court of Appeal held that the plaintiff's suit for specific performance of the Farlim agreements failed, the defendant submitted that applying the said principle, the plaintiff's claim should fail on this ground. In addition, the defendant also submitted that parties cannot by consent do away with res judicata and compell the court to re-open the issue which had been decided earlier contending that the term in a consent order which is against public policy will be void referring to *Lian Mong Yee v Abdul Rashid bin Maidin & Ors* [2001] 4 MLJ 38; [2001] 3 CLJ 905 (CA).

[24] In the order of court dated 25 February 2010 (bundle C pp 268– 270) and the grounds of judgment of the learned judge hearing the said OS (bundle C pp 272–279), the crux of the dispute between the parties as to the existence of a concluded contract of sale and purchase had been decided upon a full

hearing. It will be against public policy that in the existence of such an order and judgment, parties are permitted to ignore such judgment by consenting to relitigate the matter once again. To allow the parties to so do would tantamount to virtually permitting the parties to renege the decision or judgment of the learned judge and to bypass the appeal process so that parties can get a second bite at the cherry by opening the issues again before another judge despite the fact that those cause of action and/or issues have been decided earlier. In such circumstances, the order and judgment of the learned judge would have no meaning and no effect; similarly, the appeal process would also be redundant since parties can ignore the previous decision of the court relating to the same cause and same issues to relitigate the matters by consent instead of appealing against that order or judgment which is not favourable to them. This can certainly by not be countenanced. The proper course that the party dissatisfied with or aggrieved by the said order or judgment is to proceed to appeal to the Court of Appeal to overrule that decision and it is not by way of seeking another judge of co-ordinating jurisdiction to reverse the earlier decision which the subsequent judge does not have that jurisdiction to do so. Res judicata is a legal doctrine and I must agree that it is against public policy and not permissible for parties to waive or ignore its applicability by mutual consent or to contract out, so to speak. I therefore hold that the plaintiff cannot rely on a term agreed upon by consent to oust the applicability of the law. Doctrine of res judicata is thus still applicable to estop the same issues which had already been litigated and decided by the learned judge in the OS proceeding from being reopened again.

[25] From the above reasons and applying the said doctrine, I find that the plaintiff is barred from reopening the issues of whether there was a valid and concluded sale and purchase agreement of the said land which had been decided earlier with judgment being delivered. The plaintiff's claim must consequently fail on this ground since it had been held earlier that there was no such concluded contract to render this claim sustainable.

SECOND ISSUE

[26] On the assumption that this court has erred in the above finding, I shall consider this issue of whether there had been a binding and concluded contract between the parties herein in respect of the sale and purchase of the said land.

[27] The plaintiff submitted that all essential terms and conditions had been agreed upon by the parties at the meeting on 20 February 2006 itself. These essential terms and conditions are:

(a) the purchase price of RM2,161,394.90 at the rate of RM19.80 per sqft;

(b) the said land is sold without vacant possession with no more than two squatters;

(c) the plaintiff will deposit RM53,000 with the defendant as stakeholder to assist in paying compensation to the squatters to move out from the land and the illegal structures to be demolished; otherwise, the said sum would be returned to the plaintiff;

(d) the completion date for the sale and purchase was nine months;

(e) earnest money in the sum of RM10,000 was to be paid by the plaintiff to the defendant; and

(f) the defendant was to give the plaintiff a power of attorney to carry out the development of the said land.

[28] The defendant did not dispute that there were negotiations on the sale and purchase price and the issue of without vacant possession since there are squatters on the said land but had denied that they had agreed on all the rest of the alleged essential terms as contended by the plaintiff above. The defendant contended that it is clear from the correspondence between their solicitors and the solicitors acting for the plaintiff that there shall be no concluded contract unless and until a sale and purchase agreement had been executed by both parties.

[29] On the face of these conflicting versions between the parties with the plaintiff and their witnesses on the one hand asserting the existence of a concluded contract with the terms and conditions being agreed upon by the parties at the meeting itself while the defendant and their witnesses on the other hand expressing that there was no contract unless and until a binding written sale and purchase agreement had been executed by both parties and that the defendant needed to go through an EGM before they could proceed to conclude the sale of the said land, I find it safe and feasible to look to documentary evidence or silent evidence to determine the probable truth whether a contract had been concluded as alleged or that there was no contract unless and until a sale and purchase agreement had been duly executed; see *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprise Sdn Bhd* [1994] 2 MLJ 754 where the Supreme Court determined the intention of the parties by referring to the correspondence between the parties, inter alia; *Kim Guan & Co Sdn Bhd v Yong Nyee Fan & Sons Sdn Bhd* [1983] 2 MLJ 8 where the Privy Council examined the documentary evidence in order to determine the oral evidence as to the conclusion of the alleged bargain.

[30] Before going into the documentary evidence, it is advisable to remind ourselves of the elementary principles of offer and acceptance which had been

well said by Gill J (as His Lordship then was) in *Low Kar Yit & Ors v Mohamed Isa & Anor* [1963] 1 MLJ 165 in the following words:

> It is plain that a contract comes into existence where there has been an unqualified acceptance of a definite and unequivocal offer, the corollary of which is that there can be no binding contract either if a conditional offer is followed by an unqualified acceptance or if an unqualified offer is followed by a conditional acceptance; in either of these two case no legally binding contract will arise unless and until the stipulated condition is fulfilled. In other words, where a condition is attached to an offer, an unqualified acceptance of that offer must result in a similar situation as will arise on a qualified acceptance of a definite offer …

[31] Beside the defendant's evidence that there was no contract unless and until a sale and purchase agreement had been executed, assuming for a moment that all the terms and conditions had been agreed upon, the defendant's condition that they needed to get the consent or approval through an EGM of the company before they could conclude the sale and purchase agreement would place their offer or acceptance as equivocal or qualified. Looking in that light, it cannot be said that a contract had been concluded. The plaintiff contended that there was no mention of the defendant having to obtain consent or approval through an EGM of the defendant company or that there was such no requirement since the sale will enhance the value of the company and could not be minority oppression as well as the fact that the shareholders had no rights over the company's property as company's assets belong to the company. It was also contended that the two directors of the defendant at the said meeting on 20 February 2006 were majority shareholders and could have easily approved the EGM.

[32] It is undisputed that the defendant was the material time a family company. For the sale of the company property which could probably be the sole landed property for sale though defence witnesses said it was the sole asset which is inappropriate as admitted, I think the controlling parties in the defendant company could not be faulted for taking into consideration the sensitivity of the other minority shareholders who were also family matters. I do not doubt that this is an internal affair of the defendant. However, when this issue of having to seek the approval of the EGM became a pre-condition to the defendant before they could formally enter into a contract with the plaintiff, it is untenable to argue that the defendant needed not obtain such approval but had to force through the EGM with the majority shareholding of the two directors in order to sell the said land to the plaintiff. The plaintiff had no right to demand how the defendant or their directors should run the defendant's company and whether the directors would or should take into consideration the views of their minority shareholders or not will be entirely in their absolute discretion which they think would serve the best interest of their company. Therefore, the defendant is not obliged to act arbitrarily against the view of the

minority shareholders when they had put forward such condition to the plaintiff during that meeting on 20 February 2006. From the existence of DW1 and DW2 on this point of having to obtain approval via an EGM, I find that this fact had been substantiated by the letter dated 16 March 2006 (bundle B pp 8–9) from the defendant's solicitors, Messrs Lee Hean Cheng & Co to the plaintiff's solicitors Messrs Ibrahim & Kim which said that 'our client's company's EGM to approve the above sale will only be held on 21 March 2006'. This is not an afterthought as at this date of 16 March 2006, it was expressed in the same letter that 'we acknowledge that our client is interested to sell without vacant possession the property at RM2,161,394.00 for 2.506 acre'. From the letters of the plaintiff's solicitors, astonishingly there was, however, no objection taken on this question of the defendant having to obtain such approval if that was a pre-condition to the execution of the contract. On a balance of probabilities, I find the evidence of the defendant over this pre-condition of having to obtain the EGM approval before concluding the sale and purchase to be more probable and I accept this evidence of the defence.

[33] Moving on to the question of compensation in the sum of RM53,000 to be paid to the squatters which the defendant contended that it was not discussed or agreed upon in the said meeting, I am more inclined to believe the evidence of the plaintiff that such matter had been discussed and agreed upon. I find support from the perusal of the letter of the defendant's solicitors dated 23 February 2006 (bundle B p 4) to the plaintiff's solicitors which says 'existing squatters on the said land have indicated their willingness to vacate for a compensation of RM53,000.00 in which the same will be paid by your clients to squatters vide our clients at the same time when Sale and Purchase of the land is executed'. If there had not been an agreement on this compensation, I find it to be strange that defendant could have written that the compensation would be paid through them instead of to the squatters directly by the plaintiff since the sale was without vacant possession. And if that had not been agreed upon, surely the defendant through DW1 who said that they came to know from the squatters on the date of the said letter only as to the quantum of compensation would probably have to find out from the plaintiff whether the plaintiff was agreeable to make those payments through the defendant. The words of the letter to this court is affirmative that the sum of RM53,000 was to be paid through or by the defendant which could only mean that the plaintiff must have acceded to before. The plaintiff's version is hence mote probable.

[34] As to the completion date of nine months as stated by the plaintiff in evidence and supported by their solicitor's letter dated 24 February 2006 (bundle B pp 5–6), there is no rebuttal or denial from the subsequent letter in reply from the defendant's solicitors dated 16 March 2006 (bundle B pp 8–9). I am therefore prepared to accept that the parties could most probably have discussed and agreed upon such term.

[35] Pertaining to the issue of earnest money, the plaintiff submitted that this payment is the consideration and its purpose is to bind both parties citing in support *Karuppiah v Petaling Garden Co Sdn Bhd* [1972] 1 MLJ 11 which cited the Federal Court case of *Jagathesan v Linggi Plantations Ltd* [1969] 2 MLJ 253 where Suffian FCJ (as His Lordship then was) had explained that earnest money constituted a contract within a contract and it was to show that the buyer was earnest about his bargain; if the bargain went through, this payment was to go towards the purchase price, it was to be forfeited if the bargain fell through. Once the agreement had been made and the seller had accepted payment of the earnest money the seller was precluded from accepting a higher offer from another buyer; the seller was held to his bargain even on a rising market for so long as the buyer was prepared to perform his part of the bargain. Other cases cited are *Ko Lim Tristar Sdn Bhd v Peninsular Home Sdn Bhd* [2008] MLJU 430 and *Tiong Guan Co (Pte) Ltd v Lam Kong Ko Ltd (No 2)* [1998] 7 MLJ 720 which do not derogate from the principle as enunciated by His Lordship Suffian FCJ above.

[36] On the facts in this instant case, the defendant through their solicitor's letter dated 23 February 2006 (bundle B p 4) had undoubtedly requested for earnest money in the sum of RM10,000. However, in the last paragraph of the same letter, it was expressed as follows:

> Please note that there shall be no binding contract for the sale by our clients to your clients of the said land until and unless a formal written contract has been executed by both our clients and your clients.

[37] In the subsequent letter dated 16 March 2006 (bundle B pp 8–9) from the defendant's solicitors to the plaintiff's solicitors, it was emphasised that the RM10,000 vide cheque 'shall only be used as part payment towards the purchase of the property upon signing a binding Sale and Purchase Agreement ('S&P'). In the event no S&P is executed between the parties and hence no binding contract, the said monies shall be refunded to you without any interest'. The following letter dated 21 March 2006 (bundle B p 10) from the defendant's solicitors to the plaintiff's solicitors again reiterated the same intention of requesting for earnest money by the defendant was that it 'shall only be used as part payment towards the purchase of the property until and unless a written binding S&P is signed by the vendor and purchaser. In the event no S&P is executed between the parties and hence no binding contract, the said monies shall be refunded to you without any interest and thereafter neither parties shall have any other claim (s) whatsoever against the other'. This had been the clear intention of the defendant in requesting for the earnest money which is expressed to be used as part payment in the event a binding S&P is signed or executed between the parties herein and in the event no binding S&P is executed, the earnest money is to be refunded. I find this qualification which was never refuted by the plaintiff vide their solicitors' letter

must mean that the plaintiff must have accepted the same proposition by the defendant when they had every opportunity at the material time to object or refute the defendant's intent and purpose of requesting for the earnest money. With this express qualification from the defendant, I find on a balance of probabilities basing on the facts of this case that the earnest money requested for does not constitute a contract within a contract as stated by His Lordship Suffian FCJ in *Jagathesan*'s case as the offer is conditional which means that an unqualified acceptance by the plaintiff will not render a contract to exist in such circumstances; see *Low Kar Yit & Ors v Mohamedd Isa & Anor*.

[38] On the plaintiff's submission that the earnest money of RM10,000 was agreed upon at the said meeting itself, I find it to be inconsistent with the correspondence than ensued between the respective solicitors subsequent to the said meeting. As stated, the defendant's solicitors requested for earnest money vide their letter bundle B p 4. In reply, the plaintiff's solicitors is listing out the alleged terms that were purportedly agreed upon in the said meeting did not list out the RM10,000 earnest money as one of the alleged agreed terms but merely forwarded the cheque in that sum to the defendant's solicitors along with the draft S&P and draft power of attorney. If that was the agreed term, it would certainly have been listed down as an agreed term together with the price and the other alleged terms. Upon a finding of facts, I find that there was no agreement arrived at during the said meeting as to the earnest money. Otherwise, I find no reason why the defendant's solicitors would use the words 'In the meantime, our clients request a sum of RM10,000.00' instead of 'Please forward the sum of RM10,000.00 being the agreed earnest money …' Consequently, I find that this earnest money could not be one of the essential terms and conditions nor consideration that had been agreed upon at the said meeting on 20 February 2006.

[39] The plaintiff also alleged that agreement had been reached at the said meeting on power of attorney ('PA') in that defendant had agreed to give a PA to the plaintiff for the submission of plans for purpose of development of the said land which the defendant denied. Reading the letter dated 24 February 2006 (bundle B pp 5–6) from the plaintiff's solicitors to the defendant's solicitors which had listed out the alleged agreed terms which included the purchase price, squatter buildings on the said land of not more than two units, the deposit of RM53,000 as payment to the two squatters upon execution of the S&P subject to the defendant's solicitors' undertaking not to release the said sum to the squatters unless and until the squatters had vacated and demolished the premises erected and to return the said sum in the event that two squatter buildings were not demolished on or before the completion date which shall be nine months from the date of the S&P, the PA was nevertheless not included as an agreed item but its draft was enclosed together with the cheque for the earnest money and the draft S&P. It has never been expressed that the

defendant had agreed with the plaintiff to grant a PA to the plaintiff on whatever terms that had been discussed and agreed upon. In the absence of such expressed words in the said letter bundle B pp 5–6, it is difficult to perceive that such PA had been discussed and agreed upon at the meeting on 20 February 2006 as alleged by the plaintiff which was denied emphatically by the defendant. The fact that the draft PA was forwarded together with the draft S&P does not affirmatively denote that must have been agreed by the defendant. The plaintiff is a development company and the purpose of buying the said land was none other than to develop it which necessitated the submission of plans for approval. If the completion date is nine months, it is conceivable that the plaintiff would need a PA to facilitate the initial development work before the completion date of nine months which is longer a duration than the normal completion date of 3 + 1 months. Therefore, I find that a draft PA is merely a practice which is tied to the draft S&P and of course it will be left to the defendant whether they were agreeable to granting it to the plaintiff. That being the case, it cannot be said that the defendant had agreed to grant the PA at the said meeting, when the option is still in the hand of the defendant whether to grant the PA and if they should decide to grant it, on what terms that they would provide to the plaintiff. From the evidence before the court, I find that there was no express agreement on this PA as alleged by the plaintiff.

[40] More pertinently, the intention of the contracting parties to enter into a concluded contract must be *ad idem* and not unilateral. Intention can be inferred from the words of the parties, their conduct and from the surrounding circumstances, inter alia; see *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprise Sdn Bhd*; *Ho Kam Phaw v Fam Sin Nin* [1998] 2 MLJ 713; [1998] 3 CLJ 708 (CA). Scrutinising the letters from the defendant's solicitors to the plaintiff's solicitors vide letters dated 23 February 2006 and 16 March 2006 (bundle B pp 4, 8–9), I find that it had been consistently asserting that there shall be no binding contract for the sale and purchase of the said land until and unless a formal written contract had been executed by both parties. Even in the letter dated 21 March 2006 (bundle B p 10) from the defendant's solicitors to the plaintiff's solicitors pertaining to the earnest money, it was similarly asserted that 'until and unless a written binding Sale and Purchase Agreement (S&P) is signed by the Vendor and Purchaser'. Ironically, not a word of objection had been raised by the solicitors for the plaintiff to allege that a binding and concluded contract had been achieved by the parties on 20 February 2006 together with the essential terms and conditions agreed upon PW1, the solicitor acting for the plaintiff at the material time said in evidence that he did not want to argue on this point but to list out the agreed terms in his letter to the defendant's solicitors vide bundle B pp 5–6 dated 24 February 2006. I find it hard to believe that if there had existed a concluded contract and when the vendor's solicitors persistently said that there shall be no binding contract unless and until parties had duly executed a written one, the

very basic and minimum that PW1 is expected to do is that he ought to have denied in his reply to all those letters from the defendant's solicitors that there had been a concluded contract. Assertions of facts which are not denied or challenged akin to the failure to challenge on important and material aspects of evidence must be treated as an acceptance of those facts; see *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31, 36 (CA); *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (FC). I find no reasonable explanation as to why not a word was raised to challenge the repeated assertions by the defendant's solicitors vide the above-mentioned letters which is consistent with DWTs evidence. I accept on a finding of facts that the intention of defendant had been expressed unequivocally that there shall be no binding contract unless and until a binding written one had been duly executed by both parties herein. I find the fact that of the instant case is not one where parties have agreed on all essential terms and conditions but subject to a formal sale and purchase agreement to be drawn up or subject to further contract; see *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108, inter alia. Here apart from what DW1 had said the same in the said meeting the defendant had categorically put in writing through their solicitors' letters consistently stating that there shall be no contract unless and until a binding written sale and purchase agreement has been executed by both parties. Hence, without the plaintiff disputing such assertions which they had all the opportunities to do so, I must accept as a fact that no binding contract had been concluded unless and until a binding written sale and purchase agreement between the plaintiff and the defendant has been duly signed or executed by them in line with the actual intention of the parties at the material time of the meeting on 20 February 2006 and thereafter since it is a fact that no such S&P had been signed or executed by them. There must be consensus ad idem and if the plaintiff held the view that there was a concluded contract but had failed to challenge the defendant's intended view that there shall be no binding contract unless and until one had been executed by both parties, it is abundantly clear that the parties have not been ad idem to conclude a contract as the view held by the plaintiff is unilateral. There is thus no contract concluded as at 20 February 2006 at the said meeting.

[41] For the foregoing reasons, I hold on a finding of facts that there is no concluded contract for the sale and purchase of the said land between the plaintiff and the defendant on 20 February 2006 when the parties have not executed a binding written sale and purchase agreement of the said land. Moreover not all essential terms and condition of the alleged contract had been agreed upon. Hence there is no question of a breach.

THIRD ISSUE

[42] Upon the findings of this court as above, this third issues becomes

academic which I do not propose to deal with at length save to say that the plaintiff must not only prove that they had been at all times able and willing to complete the sale and purchase of the said land but also prove that they had performed or had been at all times ready and willing to perform his part of the contract or his part of the obligations under the contract as fixed or interpreted by the court (per His Lordship Seah FJ in *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 (FC) before specific performance can be granted. In this respect, the plaintiff through its director PW3 had tendered statements of account dated 31 December 2011 from the respective banks in respect of companies known as Global Megajaya Sdn Bhd, Galaxy Mall Sdn Bhd and Era Alpha Sdn Bhd (exh P9) which the plaintiff claimed to be related companies to indicate the resources or funds that could be utilised to complete the contract. Without the necessity of details, I am prepared to give the benefit of the doubt that the plaintiff had the resources to be ready and willing to perform their part of the contract on the assumption that the aforesaid related companies would readily pass resolution to give their funds for the said sale and purchase to completed.

CONCLUSION

[43] Having considered the case as a whole and all submissions by both parties herein, I hold that the plaintiff's claim will fail on the doctrine of res judicata. Alternatively, on a finding of facts and evidence before this court, I hold, for the reasons advanced above, that the plaintiff had failed to prove their case of a concluded and binding contract on a balance of probabilities. Consequently, the plaintiff's claim is hereby dismissed with costs of RM15,000.

[44] The defendant had sought for the costs to be borne by PW3, the director of the plaintiff personally citing *Takako Sakao (f) v Ng Peh Yuan (f) & Anor (No 3)* [2010] 2 MLJ 141 (FC); *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] 2 All ER 409 (HL); *The Karting Club of Singapore v David Mah & Ors (Wee Soon Kim Anthony, Intervener)* [1992] 2 SLR 483 and *Chin Yoke Choong Bobby & Anor v Hong Lam Marine Pte Ltd* [2000] 1 SLR 137 (CA).

[45] Order 59 r 2 of the Rules of the High Court 1980 ('RHC') gives the court the full power to determine by whom and to what extent the costs are to be paid. Lord Goff delivering the judgment of the House of Lords vide the cited case of *Aiden Shipping Co v Interbulk Ltd* held that there is no basis for any proposed implied limitation on the express words of the statute (or the RHC as in our situation) which provides that 'the court shall have full power to determine by which party to the proceedings and to what extent the costs are to be applied' (as in RHC O 59 r 2). Thus, this court has that power to direct a

non-party to pay costs of this suit. In *Takako Sakao*'s case, the Federal Court had referred to the case of *Symphony Group Plc v Hodgson* [1994] QB 179 of the guidelines for making the order for costs against a non-party by Balcombe LJ in the English Court of Appeal. His Lordship Gopal Sri Ram FCJ having referred to the third guideline in *Symphony*'s case which provides, inter alia, that 'the applicant should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him … An obvious application of the basic principles of natural justice', had declined to award costs against a non-party when the successful party had failed to 'warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him'. His Lordship added that 'it is not justice, no matter what the indignation one may feel at the conduct of Dato' Chong, to make an order for costs against him personally in the present circumstances' (see p 153 of the Federal Court case). In the instant case, PW3 negotiated the sale and purchase of the said land with the defendant's directors, as director of the plaintiff. There is nothing culpable on his part of justify any order for costs against him personally. Indeed as in *Takako Sakao*'s case, no warning was given to him that the defendant may seek to apply for costs against him personally. The fact that PW3 stated that he and the director of his other related companies could pay the costs, to this court, does not suffice to constitute the requisite warning as contemplated vide the aforesaid guideline in *Symphony*'s case as the purpose of such warning at the earliest opportunity is to provide the non-party the opportunity of being heard and to defend himself in line with the principles of natural justice. I therefore disallow the defendant's application in submission for such costs to be ordered against PW3 personally.

Plaintiff's claim dismissed with costs.

Reported by Kanesh Sundrum